86- 10

No.

Supreme Court, U.S.
FILED
JUL 8 1986
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, *et al.*,

Petitioners,

v.

MAINE CENTRAL RAILROAD COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Date: July 8, 1986

LITHO IN U. S. A.

QUESTION PRESENTED

May a single event in line with a well established practice within the railroad industry of recovery of work by a shipper on shipper's property (known as "inside the fence") serve as a basis for determination that a lease of an entire railroad yard to a shipper is a "minor dispute" under the Railway Labor Act (45 U.S.C. § 151, *et seq.*) when it was found as a matter of fact by the trial court that the two situations are not analogous, thereby permitting implementation of the carrier-shipper transaction without regard to carrier obligations under the "major dispute" status quo provisions of the Act?

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IN THE

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OCTOBER TERM, 1985

No.

UNITED TRANSPORTATION UNION, *et al.*,

Petitioners,

v.

MAINE CENTRAL RAILROAD COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FIRST CIRCUIT

Petitioners, United Transportation Union, *et al.* (hereinafter, "UTU")[1] respectfully petition for a writ of certiorari to the United States Court of Appeals for the First Circuit to review the decision of that Court dated April 9, 1986, which permitted a railroad to lease out the operation of the entirety of one of its yards to a shipper without first engaging in the negotiation and mediation that is required under the status quo provisions of the Railway Labor Act (45 U.S.C. §§ 152 First, 152 Seventh, 156).

OPINIONS BELOW

The opinion and judgment of the Court of Appeals issued April 9, 1986, are reproduced as Appendices B and C to this

[1]Petitioners in this case include the United Transportation Union and the following individuals named in their capacities as union representatives by respondents: E. F. Lyden (Vice President); E. A. Phillips and Harold Erickson (General Chairmen); Peter N. Green, Gregory N. Kennedy, Gregory F. Geagan, Leo Higgins, Dominic Maietta and Rober K. Ash (Local Chairmen).

petition (Pet. App. B, C).[2] Petitioners' request for rehearing was denied May 22, 1986, the denial being reproduced as Appendix D to this petition (Pet. App. D). The decision and judgment of the District Court granting petitioner herein a permanent status quo injunction are reproduced as Appendices E and F to this petition (Pet. App. E, F). The temporary restraining order initially entered in favor respondents in the District Court is reproduced as Appendix G to this petition (Pet. App. G).

JURISDICTION

The judgment of the First Circuit was entered on April 9, 1986 (Pet. App. C). A timely petition for rehearing was denied May 22, 1986 (Pet. App. D). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition involves the proper interpretation to be given to the status quo provisions of the Railway Labor Act, 45 U.S.C. §§ 152 First, 152 Seventh, and 156. Those statutory provisions have been reproduced for this Court as Appendix A to this petition (Pet. App. A).

STATEMENT OF THE CASE

On October 1, 1985, Respondent carriers leased their Rumford, Maine Yard trackage to Boise Cascade Corporation, one of their shippers. That shipper is engaged in manufacturing paper and made heavy use of Respondent carriers in making its shipments from its mill at Rumford. Under the lease, the shipper had an option to perform its own switching and maintenance functions with its own employees. The shipper notified Respondent carriers that it intended to exercise the option to perform its own work on

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[2] As indicated by the Appendices, respondents' action against petitioners (D. Me., Civil Action No. 85-0346 P) was consolidated with an action brought by the Brotherhood of Maintenance of Way Employees against respondents (D. Me., Civil Action No. 85-0349 P), which sought the same relief against respondents as was contained in petitioners' counterclaim.

the Rumford Yard trackage commencing November 13, 1985. Petitioners threatened to strike if the Rumford Yard functions were assumed by the shipper, claiming it violated the collective bargaining agreement, practices and entire relationship between the parties. Respondent carrier sought a temporary restraining order in the District Court, which was issued on November 12, 1985, and was continued indefinitely by agreement of the parties, Respondent carriers having promised to make whole all employees represented by petitioners who were displaced as a result of the shipper assumption of Rumford Yard operations.

After hearings were held on the Respondent carriers' request for permanent strike injunction and Petitioners' counterclaim for permanent status quo injunctive relief under the Railway Labor Act (45 U.S.C. 151 *et seq.*), the District Court issued the status quo injuctive relief sought by Petitioners. Respondent carriers were enjoined from violating the status quo provisions of the Railway Labor Act (45 U.S.C. §§ 152 First, 152 Seventh and 156) by "permitting or continuing to permit switching operations . . . of its Rumford Yard to be performed by persons other than those represented by [UTU] . . ." (Pet. App. F). Respondent carriers were ordered by the Court to ". . . forthwith return the relationship between the parties in respect to the manning of the Rumford Yard to the *status quo* as of November 12, 1985. . . ." (Pet. App. F). The District Court denied carrier's request for injunction pending appeal. However, the First Circuit stayed the permanent status quo injunction pending appeal.

The First Circuit reversed the grant of the permanent status quo injunction, holding that a prior lease of interchange track to Carter Milling, representing a recapture of work inside the fence (on the property of the *shipper*), recognized and well-established in the industry, could be relied upon by the Respondent carrier to establish a "practice" to the extent that the First Circuit characterized the Respondent carriers' position as not "totally implausible." This had the effect of permitting the continuance of the shipper conduct of Rumford Yard operations, with the unions being relegated to arbitrating the matter under Section 3 of the Railway Labor Act (45 U.S.C. § 153).

REASONS FOR GRANTING THE WRIT

In holding that the facts herein present a "minor dispute" under the Railway Labor Act (thus permitting implementation by the carriers subject only to arbitration pursuant to 45 U.S.C. § 153) and reversing the factual finding of the district court that a "major dispute" under the Act existed (requiring maintenance of the status quo until the negotiation and mediation procedures of the Act contained in 45 U.S.C. §§ 155-56 are exhausted) the First Circuit's decision is internally inconsistent. The decision recognizes that the *single* transaction it relies upon for its holding represented the well established practice in the industry of recovery of work done on a *shipper's* own property ("inside the fence") (Pet. App. B at 4b, 5b), yet holds that the lease of carrier track for interchange with the shipper might well be "so rare an occurrence that one instance would be enough [to establish a practice]." (Pet. App. B at 6b).

The First Circuit decision, in permitting a single instance, in accord with industry practice, to establish the agreement between union and carrier, is in direct conflict with the decision of this Court in *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142 (1969), which, as the panel below recognized, requires occurrence "for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of [the agreement]." (Pet. App. B at 6b).

The decision below also expands the "not obviously insubstantial" standard for determination of "minor disputes" contained in *Carbone* v. *Meserve*, 645 F.2d 96 (1st Cir.), *cert. denied*, 454 U.S. 859 (1981), and in virtually every Circuit that has

considered the issue,[3] by permitting the single instance of recognized industry practice to create an agreement not assented to by the union because the carrier position is "not totally implausible." (Pet. App. B at 6b).

The decision is also in conflict with the Tenth Circuit decision in *St. Louis Southwestern Ry.* v. *Bro. of RR. Signalmen*, 665 F.2d 989 (10th Cir. 1981), *cert. denied*, 456 U.S. 945 (1982) wherein it was held a "major dispute" existed in the face of a "practice" argument by the carrier to permit contracting out very similar to that presented here. The Tenth Circuit so held because contracting out was so out of harmony with the entire collective bargaining relationship that if the right existed, it should have been expressly stated as an exception.

Additionally, the First Circuit's decision herein is in conflict with the decision of the Second Circuit in *Local 553, Transp. Workers Union* v. *Eastern Airlines*, 695 F.2d 668 (2d Cir. 1983) in that it fails to recognize that in making the "major/minor dispute" determination, a court must focus on the extent of the disruption likely to be caused by the carrier action to be in accord with *Detroit & Toledo Shore Line* v. *UTU*, *supra*, 695 F.2d at 673-74. It must be noted, as the Second Circuit noted (*Id.*), that this Court has emphasized that Congress created the "major dispute" negotiation and mediation process to resolve the "large issues about which strikes ordinarily arise." *Elgin, Joliet, & E. Ry.* v. *Burley*, 325 U.S. 711, 723-24 (1945). The First Circuit's failure to recognize the great possibility for disruption here, owing to the apparent ability of the carrier now to "contract out" the collective bargaining relationship created by the Act out of existence by depriving employees of work covered thereunder, place it well

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[3]In *United Transportation Union* v. *Penn Central Transp. Co.*, 504 F.2d 542, 544 n.5 (3rd Cir. 1974) the Third Circuit noted only the Fourth and Tenth Circuits had not adopted the "not obviously insubstantial" or "arguable" test in determining the existence of a "major" or "minor" dispute under the Act. In *United Transportation Union* v. *Norfolk & Western Ry.*, 605 F. Supp. 169, 171 (W.D. Va. 1985), the district court adopted an "arguable" standard relying on *Norfolk & Portsmouth Belt Line R.* v. *Brotherhood of Railroad Trainmen* 248 F.2d 34, 43-44 n. 4 (4th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958).

outside the holding of this Court in *Detroit & Toledo Shore Line* v. *UTU*, *supra*, and the mainstream of decisional law in this area.

A question of exceptional importance is at stake here, to wit, whether the decision below renders nugatory the *status quo* provisions of the Railway Labor Act (45 U.S.C. § 151, *et seq.*), which this Court found are "central to its design" in *Detroit & Toledo Shore Line* v. *UTU*, *supra*.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully request this Court issue a writ of certiorari to the United States Court of Appeals for the First Circuit to review its decision that a single instance of well recognized industry practice on the property of a shipper can relieve a railroad of its obligations to maintain the status quo in the collective bargaining relationship as required by the status quo provisions of the Railway Labor Act (45 U.S.C. §§ 152 First, 152 Seventh, 156).

Respectfully submitted,

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Date: July 8, 1986

APPENDIX A:

STATUTES RELIED UPON:

RAILWAY LABOR ACT. 45 U.S.C. §151. *et seq.*

A. Section 2, First, 45 U.S.C. § 152, First:

§152. General duties

First. It shall be the duty of all carriers. their officers. agents. and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay. rules and working conditions. and to settle all disputes. whether arising out of the application of such agreements or otherwise. in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof

B. Section 2, Seventh, 45 U.S.C. § 152, Seventh:

Seventh. No carrier. its officers or agents shall change the rates of pay. rules. or working conditions of its employees. as a class. as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

C. Section 6, 45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay. rules. or working conditions. and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice. and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given. or conferences are being held with reference thereto. or the services of the Mediation Board have been requested by either party. or said Board has proferred its services. rates of pay. rules. or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act. by the Mediation Board. unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

APPENDIX B:

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 86-1037

MAINE CENTRAL RAILROAD COMPANY
PORTLAND TERMINAL COMPANY
AND GUILFORD TRANSPORTATION INDUSTRIES, INC.,
Appellants,

v.

UNITED TRANSPORTATION UNION
AND BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[Hon. Gene Carter, *U.S. District Judge*]

Before
Coffin and Aldrich, *Circuit Judges*,
and Pettine,* *Senior District Judge*.

Stephen M. Olson with whom *David J. Strasser*, *James E. Howard* and *Kirkpatrick & Lockhart* were on brief for appellants.

Clinton J. Miller, III for United Transportation Union.

Louis P. Malone, III, General Counsel, with whom *Craig J. Rancourt* was on brief for Brotherhood of Maintenance of Way Employees.

April 9, 1986

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*Of the District of Rhode Island, sitting by designation.

ALDRICH, *Senior Circuit Judge*. This case originally came before us on a motion for stay pending appeal of a permanent injunction against Maine Central Railroad (MEC), Portland Terminal Company, and Guilford Transportation Industries. After argument, on our being informed that the record was complete, and seeing no purpose served by giving the parties a second bite at the apple, we continued our interim stay and ordered final briefing preparatory to full disposition. The parties having supplemented their initial briefs, we turn to the appeal on the merits.

Briefly, the facts are these. MEC has a customer at Rumford, Maine, Boise Cascade Corporation (Boise), engaged in manufacturing paper, requiring heavy traffic. Much of this is handled by MEC, which owns track and conducts switching operations at the Rumford Mill. MEC employed United Transportation Union (UTU) and Brotherhood of Maintenance Way Employees (BMWE) to perform these operations. On October 1, 1985, apparently because of Boise's expressed dissatisfaction with MEC's switching, MEC leased the Rumford Yard trackage to Boise, with an option to Boise to conduct the switching and maintenance operations with its own employees. Boise notified MEC of its intention to exercise the option commencing November 13, 1985. The unions, objecting to the loss of employment, threatened to strike. MEC brought suit in the district court seeking a temporary restraining order and, ultimately, an injunction. The court issued the former on November 12, 1985, which, by agreement, was continued without day. All MEC employees at the Rumford Yard were replaced by Boise employees, and were shifted to other, but perhaps poorer, positions. After the ripples of seniority bumping smoothed out, nine other UTU trainmen — no BMWE members — were displaced.

Hearings on a permanent injunction were held before a second judge on January 9 and 14, 1986. An injunction resulted, but the other way around, in favor of the unions, with MEC

> enjoined from violating the *status quo* provisions of the Railway Labor Act (45 U.S.C. § 152, First, Seventh and § 156, [sic] by permitting or continuing to permit switching operations and maintenance of its Rumford Yard to be

performed by persons other than those represented by [UTU] and [BMWE]; and it is

FURTHER ORDERED that MEC and Portland Terminal Company forthwith return the relationship between the parties in respect to the manning of the Rumford Yard to the *status quo* as of November 12, 1985 . . .

This order was stayed pending appeal; consequently Boise employees are presently servicing the yard.

The question here, as below, turns on the nature of the dispute. A "minor" dispute, viz., one over interpretation and application of the union contract, is to be negotiated by the parties, and, failing resolution, submitted to the National Railroad Adjustment Board for binding arbitration. 45 U.S.C. § 153, First; *see Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 727 (1945). In the meantime, the railroad is free to apply its interpretation, and may, notwithstanding the Norris-LaGuardia Act, obtain an injunction against striking. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30, 40-42 (1957). A so-called "major" dispute, viz., one involving not an existing agreement, but "the acquisition of rights for the future," *Elgin*, ante, 325 U.S. at 723, is first negotiated, and, if negotiation fails, is sent to mediation under the National Mediation Board, 45 U.S.C. § 156. Failing resolution here, there are various other forms of noncompulsory adjustment. *Elgin*, ante, 325 U.S. at 725. Either party, requesting such processing of a "major" dispute by proper notice under 45 U.S.C. § 152, Sixth, is entitled to a "status quo" injunction. *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142, 155 (1969). Thus, as evidenced by the two orders issued below, depending on the characterization of the dispute, one party or the other will be entitled to a favorable injunction.

UTU and BMWE argued successfully before the second judge, hereinafter the court, that MEC's abolition of all positions at Rumford was an attempt to acquire a set of totally new "rights for the future," which must be processed as a major dispute before it can be effected. *See Carbone* v. *Meserve*, 645 F.2d 96, 98

(1st Cir. 1981), *cert. denied*, 454 U.S. 859. The court found, and appellants do not dispute, that "[T]he contract language . . . does not apply . . . . either to expressly or by reasonable implication, authorize or prohibit [the lease arrangement and resulting job abolishment]." We do not rest our decision on MEC's initial contention that, because the contract was silent, its action was a management decision. Rather, we turn to the alternative, that past practices and working conditions may become part of the collective bargaining agreement notwithstanding silence in the agreement itself. *See Detroit & Toledo Shore Line*, ante, 396 U.S. at 154-55.

Appellants point to three previous, accepted actions, which they claim support the present ones. The court disagreed: "None of the three instances . . . is sufficiently parallel to the Boise Cascade lease arrangement and the job abolishment to establish that the type of transaction . . . has been previously treated by either of the parties as governed by the existing contract arrangement. . . ." In so finding, the court accepted appellees' argument that each of these instances was distinguishable from the one at issue. We read this resolution, however, as exceeding its authority.

Ours and, we believe, the majority view, is that the court's role is limited to determining whether MEC's assertion is "even 'arguable.' " *Carbone*, ante, 645 F.2d at 99. If MEC presented instances of past practice accepted by the unions which, arguably, could support its contention, the court's inquiry must end; it is not for it to weigh, and decide who has the better of the argument. If the court did this, it overstepped its bounds and usurped the arbitrator's function. *See id.*, 645 F.2d at 100; *Airline Stewards & Stewardesses Ass'n. v. Caribbean Atlantic Airlines*, 412 F.2d 289, 291 (1st Cir. 1969). We find that, in fact, this is what it did.

In each of the three instances relied on by appellants MEC leased track to another party, who then assumed all operations. The direct result, as here, was the abolition, or reduction, of all MEC jobs on the track. Appellees, and the court below, would distinguish these instances as follows: the first, a lease of track to Carter Milling, because it represented a recapture of work within

the fence, well established in the industry, and because the job consequences on union employees were not as severe; and the other two, leases to the Georgia Pacific and the Lamoille Valley railroads, because they were subject to ICC approval. The court also suggested that with respect to the latter the unions might have acquiesced because, the work still being performed by railroads using, presumably, union employees, the impact on the unions was less severe.

As two examples, we note the following.

> THE COURT: Isn't that important in using those instances of prior practice to determine what the parties mutually understand the language of the contract to mean? Isn't it important to see if there are factors, factual distinctions in these situations, which might occasion, for example the union, to think that its position was weak with respect to the Georgia Pacific and the Lamoille Valley situation, whereas here, in this situation, where there are going to be, as a result of strictly private arrangements of Boise Cascade, other individuals employed to do this switching and maintenance work, they might think their position was stronger. In other words that the language of the contract might cover one situation, namely this one, and not the other.

> THE COURT: Carter Milling can be distinguished from the present situation on the basis that it did not involve, at least as significant job consequences for union employees?

We agree that there are differences that distinguish those cases factually from this one, but there are ways in which they relate, and it is not the court's role to choose, or speculate as to their practical effect. Under the law, resolution is committed to the arbitrator, who possesses expertise no court can hope to replicate. This is not to say that a party, simply by conjuring up instances of past practice and claiming they support its position, can successfully characterize a dispute as minor. The court's role, however, is only to determine whether that claim is "so obviously

insubstantial as to be an attempt to circumvent [the "major dispute" provisions of the Act]." *Airline Stewards*, ante, 412 F.2d at 291. The degree of scrutiny, while ill-defined, is clearly light. When, as here, the court weighs a party's reasons for not protesting an instance that on its face bears some similarity to the dispute at issue, it has looked too hard.

Whether this is what the court did is a close question. Past practice is not indicative of the meaning of the contract or, to put it another way, is not a part of the total contract, unless it was accepted. This is basic contract law. In the *Georgia Pacific* case the lease arrangement was put through by ICC approval (affirmed by the District Court), over the continuous, though unsuccessful, objection of the UTU. This clearly took it out of the contract. *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, No. 85-1852, decided this day. It is perhaps arguable that the Lamoille Valley ICC matter is not so readily disposed of, since the union there voiced no objection. As against this, however, it would seem arguable that the union's acquiescence was not in recognition of the contract, but because of satisfaction with the so-called Mendocino Coast employee protection conditions (354 I.C.C. 732 (1978), as modified at 360 I.C.C. 653 (1980)). We need not resolve this question, however. The Carter Milling matter was free of any strings. While in many cases it might well be doubted whether a single instance could be regarded as a practice that "had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of [the agreement]." *Detroit & Toledo Shore Line*, ante, 396 U.S. at 154; *cf. Baker* v. *Railroad Yardmasters of America*, 347 F.Supp. 215, 218 (E.D. Pa. 1972), *aff'd*, 480 F.2d 917 (3d Cir.), we think that in this instance it could have. A lease of track to a customer, as opposed to another carrier, might well be so rare an occurrence that one instance would be enough. This is a matter of degree. We cannot quite say that MEC's argument is totally implausible.

Nor, though argued extensively by appellees, is this a matter where the district court's resolution is to be accepted unless

clearly erroneous (F. R. Civ. P. 52(a)). In fact, precisely the opposite principle applies — the court is not empowered to make findings of fact. "[W]hether the contractual defense is frivolous," *Airline Stewards*, ante, 412 F.2d at 291, was negated freely by us both there and in *Carbone* v. *Meserve*, ante, without reference to Rule 52(a). The cases appellees cite for the proposition that the court's "factual findings were justified" in no way contradict this proposition. That on an interlocutory appeal from a preliminary injunction weight may be given to the district court's findings of a likelihood of success, *Local 553, TWU* v. *Eastern Airlines*, 695 F.2d 668 (2d Cir. 1983), is a different matter entirely.

We conclude that the dispute between the parties is minor. MEC, having shown to the satisfaction of the first judge that the risk of interference with the Act's resolution process, viz., a strike, was serious, is entitled to the injunction it sought. A court, in its discretion, may attach conditions to the injunction to avoid irreparable injury, *see*, *Brotherhood of Locomotive Engineers* v. *Missouri-K.-T. R.R.*, 363 U.S. 528, 533-34 (1960), but the second judge's commendable statement, to complete the ruling for appeal, that the unions had "not made a showing of irreparable injury justifying entry of an injunction against the carrier if the dispute is found to be 'minor,' " takes that question out of the case. Accordingly, we reverse the "status quo" prior-to-the-lease injunction, and remand with instructions that the court enter an order enjoining UTU and BMWE from striking during the pendency of the procedures prescribed by 45 U.S.C. § 153.

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APPENDIX C:

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 86-1037

MAINE CENTRAL RAILROAD COMPANY,
PORTLAND TERMINAL COMPANY,
AND GUILFORD TRANSPORTATION,
INDUSTRIES, INC.,
Appellants,

v.

UNITED TRANSPORTATION UNION,
AND BROTHERHOOD OF MAINTENANCE,
OF WAY EMPLOYEES, *et al.*,
Appellees.

JUDGMENT
Entered: April 9, 1986

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The "status quo" prior-to-the-lease injunction is reversed and the cause is remanded to the district court with instructions to enter an order enjoining UTU and BMWE from striking during the pending of procedures prescribed by 45 U.S.C. § 153.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

APPENDIX D:

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 86-1037

MAINE CENTRAL RAILROAD COMPANY,
PORTLAND TERMINAL COMPANY,
AND GUILFORD TRANSPORTATION INDUSTRIES, INC.,
Appellants,

v.

UNITED TRANSPORTATION UNION,
AND BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES, *et al.*,
Appellees.

Before

CAMPBELL, *Chief Judge*,
ALDRICH, *Senior Circuit Judge*,
COFFIN, BOWNES, BREYER,
and TORRUELLA, *Circuit Judges*,
and PETTINE,* *Senior District Judge*.

ORDER OF COURT

Entered: May 22, 1986

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing of appellee, United Transportation Union, and its suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc.

It is ordered that the suggestion for rehearing en banc be hereby denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

*Of the District of Rhode Island, sitting by designation.

APPENDIX E:

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MAINE CENTRAL RAILROAD COMPANY,

Plaintiff

v.

UNITED TRANSPORTATION UNION, *et al.*, Civil No. 85-0346-P

Defendants

(CONSOLIDATED)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,

Plaintiff

v.

MAINE CENTRAL RAILROAD COMPANY, *et al.*,

Defendants

CARTER, District Judge

ORDER

I. "Major" versus "Minor" Disputes

After hearing and upon consideration of written submissions and oral arguments of counsel, the Court makes the following findings of fact. The contract language in question, as set forth in Plaintiff Maine Central Railroad Company's Exhibit 1, does not apply to the Boise Cascade lease arrangement with Plaintiff Maine Central Railroad Company and the resulting job abolishment, either to expressly or by reasonable implication, authorize or prohibit them. None of the three instances of past practice under the

existing agreement pointed to by the carrier is sufficiently parallel to the Boise Cascade lease arrangement and the job abolishment to establish that the type of transaction represented by them has been previously treated by either of the parties as governed by the existing contract arrangement between them.

The dispute over the legal right of the carrier to bring about job abolishments by the implementation of lease arrangements of the Boise Cascade type has never been addressed by the parties within the context of their present contract arrangement. The significance of the resolution of that dispute, whatever result is reached, cannot help but significantly change the *status quo* of that relationship by enlarging or diminishing the rights of one or the other of the parties to the contract relationship as they existed prior to November 13, 1985.

Accordingly, the Court concludes that the carrier's claim that the Boise Cascade lease transaction and the resulting abolishment of the positions of nine trainmen at the Rumford Yard are within rights conferred upon it by the existing contract arrangement with the unions are insubstantial. Therefore, the dispute is a "major dispute" under the Railway Labor Act, 45 U.S.C. §§151, *et seq.*

The Court will enter an appropriate order, to be drafted by counsel for United Transportation Union and submitted to the Court forthwith for its approval, requiring that the carrier, Maine Central Railroad Company and the Portland Terminal Company, forthwith return the relationship between the parties to the *status quo* as of November 13, 1985, and to maintain such *status quo* until further order of this Court or other lawful authority to change it.

II. Irreparable Injury

In light of the Court's resolution of the foregoing issue, it is not necessary for the Court to reach the issue of whether the carrier's action causes irreparable injury to the United Transportation Union and its membership if the lease transaction be

considered to be the subject of a "minor dispute" under the Act. The Court will indicate, however, in the interests of the completeness of this ruling for purposes of appeal, that should the Court reach that issue it would conclude, on this record, that the United Transportation Union has not made a showing of irreparable injury justifying entry of an injunction against the carrier if the dispute is found to be "minor." The Court is not persuaded that an arbitrator's award attempting to identify, quantify, and compensate for any wrong that may ultimately be found to have been done would be virtually meaningless.

International Association of Machinists v. Frontier Airlines, Inc., 664 F.2d 538, at 542 (5th Cir. 1981).

So *ORDERED*.

GENE CARTER
United States District Judge

Dated at Portland, Maine this 9th day of January, 1986.

APPENDIX F:

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MAINE CENTRAL RAILROAD COMPANY.
Plaintiff

v.

UNITED TRANSPORTATION UNION, *et al.*, Civil No. 85-0346-P

Defendants

(CONSOLIDATED)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES.
Plaintiff

v.

MAINE CENTRAL RAILROAD COMPANY, *et al.*, Civil No. 85-0349-P

Defendants

CARTER, District Judge

PERMANENT INJUNCTION

This matter came on for final hearing on the Complaint and Verified Counterclaim in 85-0346-P and the Complaint in 84-0349-P. The Court, having considered the testimony and evidence, supporting affidavits, the memoranda and arguments of counsel, and the record of the hearing held herein, and being otherwise duly advised in the premises, has found the Counterclaim of Defendants in 85-0346-P and the claim in the Complaint in 85-0349-P to be well taken, and has determined that the same should be, and they hereby are, *GRANTED* in accordance with the Order issued this date.

Wherefore, it is hereby *ORDERED* that Maine Central Railroad Company ("MEC"), Portland Terminal Company, and all others acting in active concert with them, are hereby enjoined from violating the *status quo* provisions of the Railway Labor Act (45 U.S.C. §152, First, Seventh, and §156, by permitting or continuing to permit switching operations and maintenance of its Rumford Yard to be performed by persons other than those represented by United Transportation Union ("UTU") and Brotherhood of Maintenance of Way Employees ("BMWE"); and it is

FURTHER ORDERED that MEC and Portland Terminal Company forthwith return the relationship between the parties in respect to the manning of the Rumford Yard to the *status quo* as of November 12, 1985; and it is

FINALLY ORDERED that this Permanent Injunction shall become effective immediately until further Order of this Court or other lawful authority.

So *ORDERED*.

GENE CARTER
United States District Judge

Dated at Portland, Maine this 15th day of January, 1986.

APPENDIX G:

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MAINE CENTRAL RAILWAY COMPANY and PORTLAND TERMINAL COMPANY Administrative Building Rigby Road West P.O. Box 9701 Portland, Maine 04103	:	
Plaintiffs,	:	Civil Action
v.	:	No. 85-0346P
UNITED TRANSPORTATION UNION 14600 Detroit Avenue Cleveland, Ohio 44107 and 679 Forest Avenue Portland, Maine 04103	:	
E. F. LYDEN, VICE PRESIDENT, UNITED TRANSPORTATION UNION; E. A. PHILLIPS, GENERAL CHAIRMAN and CHIEF OFFICER OF UNITED TRANSPORTATION UNION (CT); PETER N. GREEN, LOCAL CHAIRMAN OF UNITED TRANSPORTATION UNION (CT); GREGORY N. KENNEDY, LOCAL CHAIRMAN OF UNITED TRANSPORTATION UNION (UTU); GREGORY F. GEAGAN, LOCAL CHAIRMAN, UNITED TRANSPORTATION UNION (CT); JOSEPH LIZOTTE, LOCAL CHAIRMAN, UNITED TRANS-	:	

PORTATION UNION (CT): HAROLD ERICKSON, GENERAL CHAIRMAN and CHIEF OFFICER OF UNITED TRANSPORTATION UNION (E): LEO HIGGINS, LOCAL CHAIRMAN, UNITED TRANSPORTATION UNION (E): DOMINIC V. MAIETTA, LOCAL CHAIRMAN, UNITED TRANSPORTATION UNION (E): ROBERT K. ASH, LOCAL CHAIRMAN, UNITED TRANSPORTATION UNION, (E): and all Other Persons and Organizations Acting in Concert with the named Defendants.	:	TEMPORARY RESTRAINING ORDER
Defendants.	:	

TEMPORARY RESTRAINING ORDER

This matter came to be heard on Plaintiffs' Verified Complaint and Motion for Temporary Restraining Order, from which it appears that the Defendants have threatened to commence strikes and picketing against Plaintiffs over Plaintiff Maine Central Railroad Company's implementation of a lease of track to Boise Cascade Corporation; that such strikes and picketing against Plaintiffs may violate the Railway Labor Act; and that, if not enjoined, such strikes and picketing will cause immediate and irreparable damage to Plaintiffs and to the public before the merits of Plaintiffs' Complaint and Motion for Preliminary Injunction can be adjudicated.

IT IS THEREBY ORDERED:

1. That Defendants, their divisions, lodges, locals, officers, agents, employees and members, and all persons acting in concert with them, be and they hereby are enjoined from authorizing, calling, continuing, encouraging, permitting or engaging in strikes or work stoppages or picketing against Plaintiffs in connection with the dispute alleged in the Complaint herein.

2. That this Temporary Restraining Order is granted upon the condition that an undertaking in the sum of $1,000.00, or cash in that amount, be filed to make good such damages not to exceed said sum as may be suffered or sustained by any party who is found to have been wrongfully enjoined.

3. That, the parties have so agreed, this Temporary Restraining Order shall continue in effect until further order of the Court. *See* Commitment of plaintiffs' counsel in transcript of hearing held this date.

Edward Gignoux
United States District Judge

Dated: November 12, 1985

Supreme Court, U.S.
FILED
AUG 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-10

In the Supreme Court of the United States

October Term, 1985

UNITED TRANSPORTATION UNION, *et al.*,

Petitioners,

v.

MAINE CENTRAL RAILROAD COMPANY, *et al.*,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTION PRESENTED

Should this Court grant the Petition to determine whether the Court of Appeals erred in its application of the "obviously insubstantial" standard by holding that it was not frivolous for Maine Central Railroad Company to argue that the Agreement between the parties as supplemented by custom and practice arguably granted Maine Central Railroad Company the right to enter into the transaction in question and make necessary job abolishments as a result?

LIST OF PARTIES

The parties to the proceeding below were the Respondents, Maine Central Railroad Company, Portland Terminal Company and Guilford Transportation Industries, Inc.; Respondent Brotherhood of Maintenance of Way Employees and Petitioners, United Transportation Union and various officers of the Union.[1]

The following is a list as required by Rule 28.1 of the Supreme Court Rules of all parent, subsidiary and affiliate corporations of Maine Central Railroad Company, Portland Terminal Company and Guilford Transportation Industries, Inc.

Guilford Transportation Industries, Inc.;
Guilford Motor Express, Inc.;
Guilford Aviation Corporation;
Hudson River Estates, Inc.;
Railstar Control Technology, Inc.;

Maine Central Railroad Company;
Portland Terminal Company;

Boston and Maine Corporation;
Springfield Terminal Railway Company;
Cheshire Bridge Corporation;
The Mystic Terminal Company;
Stony Brook Railroad Corporation;
Northern Railroad;
Vermont and Massachusetts Railroad Company;
North Station Industrial Building, Inc.;
North Station Hotel Building, Inc.;

---

[1]The officers of the United Transportation Union involved in this action are E. F. Lyden, E. A. Phillips, Harold Erickson, Peter Green, Gregory Kennedy, Gregory Geagen, Leo Higgins, Dominic Maietta and Robert Ash.

Pine Tree Corporation;
Connecticut River Valley Company, Inc.;

Delaware and Hudson Railway Company;
Albany Port Railroad Corporation;
Napierville Junction Railway Co.;
Albany and Vermont Railroad Company;
Greenwich and Johnsonville Railway Company;
Wilkes-Barre Connecting Railroad Company;
Saratoga and Schenectady Railroad Company;
The Northern New York Development Company;
Wyoming Valley Improvement Company.

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No. 86-10

In the Supreme Court of the United States

October Term, 1985

UNITED TRANSPORTATION UNION, *et al.*,

Petitioners,

v.

MAINE CENTRAL RAILROAD COMPANY, *et al.*,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

The Respondents, Maine Central Railroad Company, Portland Terminal Company and Guilford Transportation Industries, Inc., respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision and judgment of the United States Court of Appeals for the First Circuit rendered on April 9, 1986, reported at 787 F.2d 780.

STATEMENT OF THE CASE

Maine Central Railroad Company ("MeC") operates a railroad in the Northeastern United States and is engaged in the intrastate and interstate transportation of freight.

Portland Terminal Company is a wholly-owned subsidiary of MeC and operates the terminal facilities at Rigby Yard near Portland, Maine through which passes freight traffic in interstate commerce. MeC is a wholly-owned subsidiary of Guilford Transportation Industries, Inc.

A. The Lease Transaction

MeC serves hundreds of customers throughout its system, including major paper mills and related industries in fourteen of Maine's sixteen counties. Boise Cascade Corporation ("Boise"), engaged in the manufacture of paper and paper products, is one of the many customers of MeC. Much of Boise's shipping needs in Maine is handled by MeC, which owns approximately nine miles of track in a yard ("Rumford Yard") adjacent to Boise's paper mill at Rumford, Maine. Members of the United Transportation Union ("UTU") and the Brotherhood of Maintenance of Way Employees ("BMWE") were employed by MeC, respectively, to perform switching operations and to maintain the track at the Rumford Yard.

On October 1, 1985, due to Boise's dissatisfaction with MeC's switching operations, MeC leased the Rumford Yard trackage to Boise, with an option allowing Boise to assume responsibility for the switching and maintenance operations. Thereafter, Boise notified MeC of its intention to exercise the option effective November 13, 1985. MeC notified the UTU and the BMWE of certain job abolishments at the Rumford Yard which would be effective November 13, 1985. Upon learning of the proposed transfer of switching and maintenance responsibilities and of the proposed job abolishments, the UTU threatened to strike both MeC and Portland Terminal Company.

B. Proceedings Below

Faced with a threatened strike, MeC and Portland Terminal Company commenced an action against the UTU and various officers of the UTU by filing, on November 8, 1985, a Verified Complaint for Declaratory and Injunctive Relief seeking to enjoin the UTU from striking. MeC and Portland Terminal Company asserted that the objections of the UTU to the lease and job abolishments gave rise to a "minor" dispute subject to §3 of the Railway Labor Act ("RLA"), 45 U.S.C. §153, over which the UTU cannot lawfully strike.

The UTU filed an Answer and Counterclaim against MeC for injunctive relief. The BMWE filed a Complaint for Injunctive Relief against MeC and Guilford Transportation Industries, Inc. and, without objection, successfully moved to have the two cases consolidated. The UTU and the BMWE sought a so-called "status quo" injunction against MeC on the asserted ground that the lease and job abolishments presented a "major" dispute subject to §6 of the RLA, 45 U.S.C. §156.

On November 12, 1985, the Honorable Judge Gignoux issued a Temporary Restraining Order enjoining the UTU from striking and denied the UTU's and the BMWE's motions for temporary restraining orders. The Court found that MeC and Portland Terminal Company were likely to prevail on their claim that the disputes between the parties arising out of the lease of track from MeC to Boise were minor disputes. Petitioners' Appendix at 2g. By stipulation, the BMWE agreed to be bound by the Temporary Restraining Order. As a result, Boise assumed responsibility for train operations and track maintenance on the leased track by contracting with an independent third party, *viz.*, Traffic Services Co.

On January 9, 1986, the District Court, per the Honorable Judge Carter, heard oral argument on the various motions for permanent injunctions and issued an Order in which it held that the dispute was major within the meaning of the RLA and, therefore, a *status quo* injunction should issue against MeC and no injunction should issue against the UTU and its officers. The District Court reasoned that the labor contract language in question did not serve to authorize or prohibit expressly the lease transaction and the resulting job abolishments. The District Court further rejected, as not being sufficiently parallel to the Boise lease, the three examples of past practice submitted by MeC to establish that previous transactions of this type had been treated by the parties as governed by the existing labor contract. Petitioners' Appendix at 1e-2e. On January 15, 1986, the District Court issued the Permanent Injunction requiring MeC to resume switching and maintenance responsibilities at Rumford Yard with MeC employees. Petitioners' Appendix F. This Order was stayed by the United States Court of Appeals for the First Circuit pending appeal.

On appeal, the First Circuit reversed the District Court. The First Circuit found that the District Court had exceeded its proper role by actually interpreting the parties' agreements, thereby misapplying the "obviously insubstantial" standard as set forth by the First Circuit in *Airline Stewards & Stewardesses Association v. Caribbean Atlantic Airlines, Inc.*, 412 F.2d 289 (1st Cir. 1969). According to *Airline Stewards*, the test to determine if a dispute is major or minor is:

> whether the company's contractual defense was so obviously insubstantial as to be an attempt to circumvent §6 of the Railway Labor Act.

* * *

> It may be that the District Court's interpretation of the contract will ultimately prove to be correct. But in deciding whether to assume jurisdiction to grant injunctive relief, the court's task is not to interpret the contract. It is to determine whether the contractual defense is frivolous. Otherwise the arbitration machinery mandated by the Railway Labor Act will be dealt a crippling blow.

Id. at 291.

The Court of Appeals held that the District Court had violated this standard by analyzing and distinguishing the examples of past practice. In effect, the District Court usurped the role of an arbitrator by rendering a decision on the merits rather than applying the "obviously insubstantial" standard. The Court of Appeals went on to hold that the Carter Milling lease was sufficiently parallel to the Boise lease transaction that MeC's defense was not frivolous and, therefore, the dispute was minor and subject to resolution before an arbitrator.

Having concluded that the District Court exceeded its authority in regard to its analysis of the past practice offered by MeC, the First Circuit did not consider MeC's initial contention that its actions were not forbidden by the express language of the contract and, therefore, were permitted as an exercise of management prerogative.

REASONS FOR DENYING THE WRIT

The Court of Appeals fully considered and correctly decided the issues raised below. Petitioners raise four grounds in support of their Petition for Certiorari. None of these arguments warrant granting the Petition.

I. The Court Of Appeals' Decision Is Not In Conflict With This Court's Decision In *Detroit & Toledo Shore Line*

Petitioners argue that the Court of Appeals' decision permitting a single instance of past practice to constitute a working condition between the union and carrier is in direct conflict with this Court's decision in *Detroit & Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S. 142 (1969).

The issue before this Court in *Detroit & Toledo Shore Line* was whether the objective working conditions which must be maintained under the RLA *status quo* requirements included working conditions not set forth in a written agreement. In answering this question in the affirmative, this Court noted that:

> It would be virtually impossible to include all working conditions in a collective bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others.

Id. at 154-55.

The Court further stated that, in order for a condition to be included among the objective working conditions, it must have "occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." *Id.* at 154.

The Court of Appeals' decision, rather than being in conflict with *Detroit & Toledo Shore Line*, is a proper application of that standard. The question facing the Court of Appeals was whether it was frivolous to argue that the

prior lease transactions proffered by MeC had "occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a party of [the agreement]." The Court of Appeals held that, given the infrequency of lease transactions, it was not "frivolous" to argue that, based on one prior transaction, the objective working conditions include the right of MeC to lease trackage and make necessary job abolishments. The First Circuit's decision does not present a conflict, but rather represents a logical and justifiable application of *Detroit & Toledo Shore Line* to the unique factual circumstances of the case at bar.

II. The Court Of Appeals Correctly Applied The "Obviously Insubstantial" Standard

Petitioners argue that the Court of Appeals' decision has expanded the "obviously insubstantial" standard for determination of minor disputes by permitting a single instance of past practice to support a finding that MeC's argument is not frivolous. To the contrary, this decision follows an unbroken line of authority in the First Circuit establishing the "obviously insubstantial" standard. *See Airline Stewards & Stewardesses Association v. Caribbean Atlantic Airlines*, 412 F.2d 289 (1st Cir. 1969) and *Carbone v. Meserve*, 645 F.2d 96 (1st Cir.) *cert. denied*, 454 U.S. 859 (1981).

Furthermore, the First Circuit decision is consistent with the law of other circuits. For example, in *Railway Express Agency v. Brotherhood of Railway, Airline and Steamship Clerks*, 437 F.2d 388 (5th Cir.), *cert. denied*, 403 U.S. 919 (1971), the carrier asserted the right to make unilateral transfers of work. The agreement between the parties neither permitted nor prohibited the carrier's

action. The carrier argued that there was, however, a history of unilateral transfers of work with no apparent objection from the union. The Fifth Circuit held that the dispute presented was minor since the asserted past practice at least gave the carrier the arguable right to make the unilateral transfer of work. The decision of whether the carrier actually had such a right must be left to the arbitrator. *Id.* at 392.

Similarly, in *Railway Labor Executives Association v. Atchison, Topeka & Sante Fe Railway Co.*, 430 F.2d 994 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971), the Adjustment Board was held to have jurisdiction to adjudicate a claim notwithstanding the fact that nothing in the agreement applied to this situation. The carrier had filed with the Interstate Commerce Commission ("ICC") a statement of its intention to discontinue service on two trains. Upon receiving notification from the ICC that it would not oppose the discontinuance and twenty days prior to the date stated in the posted notices, the carrier discontinued service.

The union, while admitting that the dispute was minor, brought what it characterized as a tort claim for the violation of a statutory duty imposed by the Interstate Commerce Act. The court held that, while there was no express language covering this situation in the contract, the question of "whether such a provision was omitted because the parties relied on the language of the Interstate Commerce Act, the 'usage, custom and practice' of the industry or whether it was rejected following negotiation" is a question requiring the expertise of the Adjustment Board. *Id.* at 996.

Even if, as Petitioners argue, this decision does expand the "obviously insubstantial" standard, Petitioners

have not asserted any reason why such an expansion is unwarranted or inconsistent with the Court of Appeals' prior decisions, with other Courts of Appeals' decisions or with any of this Court's decisions.

III. The Court of Appeals' Decision is Not in Conflict With the Tenth Circuit's Decision in *St. Louis Southwestern Railway Co. v. Brotherhood of Railroad Signalmen*

Petitioners argue that certiorari should be granted because the Court of Appeals' decision is in conflict with the Tenth Circuit's decision in *St. Louis Southwestern Railway Co. v. Brotherhood of Railroad Signalmen*, 665 F.2d 987 (10th Cir. 1981), *cert. denied*, 456 U.S. 945 (1982) *("Cotton Belt")*. *Cotton Belt*, however, is distinguishable on its facts and on the applicable legal standard applied.

In *Cotton Belt*, the Tenth Circuit was faced with a carrier's contracting out of work for the first time in more than thirty years. The Court first concluded that contracting out during the emergency conditions of World War II was too remote and dissimilar to the present conditions to give the carrier the right to contract out again. The Court then turned its attention to the parties' agreement and construed the scope clause as implicitly assuring that the carrier's signal work would be performed exclusively by the union's members. The Court further concluded that the carrier's several, unsuccessful attempts to negotiate a clause permitting contracting out was an admission that the agreement as written did not permit contracting out. Hence, a major dispute existed.

The Tenth Circuit's analysis is devoid of the standard used in the First Circuit to define major and minor disputes; *viz.*, whether the carrier's defense is "frivolous" or

"obviously insubstantial." *Airline Stewards; Carbone v. Meserve.* Apparently, in assessing the validity of past practice, in interpreting contract provisions and in applying the "obviously insubstantial" standard, the Tenth Circuit applies a different test to major v. minor disputes than the First Circuit.[2] The fact that the Tenth Circuit has not adopted this standard does not result in a direct conflict between the case at bar and *Cotton Belt.* Significantly, Petitioners are not challenging the First Circuit's use of the "obviously insubstantial" standard, only the result reached.

Such differences as to the applicable standard aside, *Cotton Belt* is also distinguishable on its facts. First, *Cotton Belt* involved the contracting out of work on property which remained in the control, and under the responsibility, of the carrier. The Tenth Circuit, interpreting both the contract and the Railway Labor Act, asserted numerous times that the carrier's work was being performed by non-employees. Of course, in the case at bar, the dispute involves track leased to, and under the responsibility of, another party. The lessee is doing its own work on the leased track, not the work of MeC. This distinction between contracting out and leasing property is significant and is ignored by Petitioners.

Second, the Tenth Circuit noted that the carrier attempted unsuccessfully several times to negotiate a provision in the agreement allowing contracting out; thus, it was proper to conclude that the agreement did not permit contracting out. By distinct contrast, it is the UTU here which has attempted to amend the parties' agreement by serving a Section 6 Notice proposing an amendment to the

---

[2]As Petitioners admit in footnote 3 of their Petition, only the Tenth Circuit has failed to adopt the "obviously insubstantial" standard.

labor contract prohibiting MeC from leasing or selling track without guaranteeing that current MeC employees will keep their jobs on the leased or sold track. If the Tenth Circuit's reasoning applied here, it would be proper to conclude that the agreement now permits MeC to do exactly what the UTU attempts to prohibit by Section 6 Notice; *viz.*, leasing track where the lessee assumes responsibility for train operations on the leased track.

Thus, both on the law and on the facts, the differences between the case at bar and *Cotton Belt* may signify two identifiable approaches, but do not present a direct conflict as asserted by the UTU.

IV. The Court Of Appeals' Decision Is Not In Conflict With The Second Circuit's Decision In *Local 553, Transport Workers Union of America v. Eastern Airlines, Inc.*

Finally, Petitioners argue that certiorari should be granted because the Court of Appeals' decision is in conflict with the Second Circuit's decision in *Local 553, Transport Workers Union of America v. Eastern Air Lines, Inc.*, 675 F.2d 668 (2d Cir. 1983). Petitioners argue that the conflict arises due to the failure of the First Circuit to "recognize that in making the 'major/minor dispute' determination, a court must focus on the extent of the disruption likely to be caused by the carrier action." Petition at page 5.

In the first instance, the Second Circuit discussed use of an "extent of disruption" standard only in *dictum*. In fact, the Second Circuit affirmed the District Court's finding of a major dispute on the ground that the pertinent

contract language did not give the carrier even an "arguable" defense. As a result, there is no genuine conflict between *Local 553* and the case at bar.

Furthermore, to the extent that *Local 553* suggests that a court focus on such a factor in making the major/minor dispute determination, it is distinguishable from the present case since that is not part of the test applied by the First Circuit. Indeed, if any decision is out of the mainstream of decisional law in this area it is *Local 553*. No other case addressing this issue has established this additional factor. *See e.g., Airline Stewards; Carbone v. Meserve; United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542 (3d Cir. 1974); *United Transportation Union v. Baker*, 482 F.2d 228 (6th Cir. 1973).

Again, it is significant to note that Petitioners have not challenged the First Circuit's use of the "obviously insubstantial" standard, but only the result; thus, the issue of whether the First Circuit should require the additional factor suggested by the Second Circuit is not even before this Court.

V. The Question Presented Does Not Warrant Review By This Court

The sole question presented by the Petitioners is whether the Court of Appeals correctly held that MeC's defense to an alleged contract violation, based on a single past practice, is not "obviously insubstantial" or "frivolous." It is clear that this decision is of limited application. Petitioners only challenge the application of the legal standard to the unique facts in this case. No sweeping principle of law is in question, since the case turns on its particular facts.

Indeed, if this Court were to find that a single instance of past practice cannot support MeC's argument, this Court would likely remand the case for a decision on whether the LaMoille Valley transaction (and the Woodland transaction) supplies an additional instance of past practice which would be further evidence supporting MeC's argument. In its opinion, the Court of Appeals states:

> It is perhaps arguable that the LaMoille Valley ICC matter is not so readily disposed of, since the Union there voiced no objection. As against this, however, it would seem arguable that the union's acquiescence was not in recognition of the contract, but because of satisfaction with the so-called Mendocino Coast employee protection conditions [citation omitted]. We need not resolve this question, however. The Carter Milling matter was free of any strings.

Petitioners' Appendix at 6b.

Furthermore, the Court of Appeals did not consider MeC's initial contention that, because the contract was silent, its actions were permitted as an exercise of management prerogative. Thus, it is clear that the situation presented before this Court will be resolved not upon legal issues of national importance, but upon factual conclusions related only to these specific circumstances.

CONCLUSION

For all the foregoing reasons, Respondents Maine Central Railroad Company, Portland Terminal Company and Guilford Transportation Industries, Inc. respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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